ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Range Technology Corporation	)	ASBCA Nos. 51943, 54340,
	)	54341
Under Contract No. MDA908-97-C-0016	)	

APPEARANCE FOR THE APPELLANT: Duane Brummett, Esq.
Niceville, FL

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Supervisory Trial Attorney
MAJ Jennifer S. Zucker, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON JURISDICTIONAL AND SUMMARY JUDGMENT MOTIONS

These appeals involve the default termination of a contract for the purchase of an anti-aircraft missile defense system, the government's demand for repayment of $533,140.00 it advanced to appellant Range Technology Corporation prior to the termination, and appellant's claim for an equitable adjustment in the amount of $1,270,549.00.

At issue and decided in this Opinion are the government's motion to dismiss for lack of jurisdiction, three motions for partial summary judgment filed by appellant and two cross-motions for summary judgment filed by the government.

STATEMENT OF FACTS FOR PURPOSE OF THE MOTIONS

On 10 March 1997, the government awarded fixed-price Contract No. MDA908-97-C-0016 to appellant in the amount of $600,000.00 using the Standard Form (SF) 1449 for commercial items. The contract required appellant to supply the government with one complete RBS-70 anti-aircraft missile defense system, consisting of a mobile launcher/guidance platform, two high-explosive missiles, together with laser and optics packages, which the contractor was to deliver to Redstone Arsenal, AL. Delivery of documentation of the system's operation was required by Contract Line Item (CLIN) 0002, at a price of $70.00, and shipment of the system by air was specified by CLIN 0003, at a price of $65,000.00. (R4, tabs 1, 4; compl., answer, ¶ 2)

The contract included the following two relevant provisions as part of contract clause 52.999-4011, DELIVERY INSTRUCTIONS: FOB DESTINATION:

> 1. Documentation Delivery and Acceptance: The Government requires the documentation well in advance of the equipment delivery so it can be translated and the inspectors can become familiar with the operation of the system. Therefore, the contractor shall provide the US Government all system documentation within 7 days of contract award. Inspection and acceptance of documentation shall be rendered upon delivery. Documentation shall be delivered to [Missile and Space Intelligence Center] MSIC at Redstone Arsenal.
>
> 2. Equipment Delivery: The contractor shall deliver the equipment no sooner than 30 days after US Government acceptance of all system documentation but not later than 45 days after Government acceptance of the documentation. The exact date and time is to be determined at the discretion of the US Government.

(R4, tab 1 at 8)

Appellant intended to obtain the system from a supplier in Venezuela (R4, tab 2 at 6). The system documentation was delivered on 17 March 1997, and accepted by the government on 18 March 1997, thus establishing a delivery date for the system between 17 April and 2 May 1997 (R4, tab 4).

In order to obtain government financing for the contract, appellant offered, and the government accepted, a reduction of $9,000.00 in the contract price. Pursuant to this agreement, bilateral contract Modification No. P00001 was executed on 8 April 1997, adding FAR 52.232-12, ADVANCE PAYMENTS WITHOUT SPECIAL BANK ACCOUNT --ALTERNATE V (JUL 1990), and providing that the government would make an advance payment in the amount of $330,000.00, with the remainder of the contract price, $261,000.00, to be paid no later than seven days after acceptance of the system. (R4, tabs 5 to 8)

Appellant did not make delivery within 45 days after government acceptance of the system documentation, a delay which Mr. Chris Hanson, appellant's president, acknowledges (in an unsworn statement) was appellant's responsibility (app. reply to gov't opp. to app. third mot., attach. 1 at 3). At appellant's request, the government issued Modification No. P00002, which was executed by the parties on 16 May 1997, extending the delivery date to "not later than 125 days after Government acceptance of the documentation," *i.e.*, to 21 July 1997, at "no change to contract price." (R4, tabs 10 to 15)

In June of 1997, the government learned that appellant might never be able to deliver the system because of the possibility its supplier would retire due to personnel rotation (R4, tab 17). Although this did not occur, internal government e-mail indicates that around the end of the month, the U.S. Embassy disapproved appellant's proposed change to use a "US charter aircraft" for delivery and temporarily "stopped any shipment through the already approved method" pending the personnel rotation (R4, tab 18). Whether a delivery was scheduled for 4/5 or 5/6 July 1997 via commercial charter aircraft as variously alleged by appellant is disputed in a statement given by Mr. William Chastain, an employee of appellant working in Venezuela, to investigators from the Office of the Inspector General (OIG) of the Defense Intelligence Agency (DIA) (R4, tab 71 at 8; app. third mot. at 4; gov't opp. to app. third mot., ex. 1 at 9-10; app. reply, attach. 1 at 16). At the time, the Department of Transportation (DOT) had not issued the "Competent Authority Approval" for shipment of hazardous material aboard a commercial aircraft required for appellant to deliver the system (gov't opp. to app. third mot., ex. 1 at 31).

By letter dated 7 July 1997, appellant advised the government that it could ship a second system with the first, and offered to sell the second system for $495,000.00. The offer was good until 9 July 1997. (R4, tab 20) There is evidence that appellant had always intended to ship two systems (gov't opp. to app. third mot., ex. 1 at 11; app. reply, attach. 1 at 4, 8-9).

On 10 July 1997, the contracting officer learned that contract performance might be discontinued because the "potential risks outweigh[ed] potential gain." He acknowledged that such a cancellation would be at the convenience of the government. (R4, tab 21) Meanwhile, by a letter dated 14 July 1997, appellant requested that the delivery date be extended to 18 July 1997, due to its supplier's concern about the delivery procedures (R4, tab 22).

The possibility of cancellation apparently remained an open issue, and on 16 July 1997, government personnel met with Mr. Timothy D. Lacey, appellant's chief operating officer, "to discuss the status of the operation and reach agreement on how best to proceed in the face of the . . . direction to shut down the operation and its reported forthcoming approval to continue the operation within a day or two." They also discussed appellant's plan to ship two systems and the fact that the government was only obligated to purchase one system. (R4, tab 23)

Agreements reached during this meeting were memorialized in bilateral Modification No. P00003 which was executed on 18 July 1997. The modification extended the delivery date to 31 July 1997, and modified the Statement of Work to provide that appellant would deliver two systems, from which the government would select one. Additionally, Modification No. P00003 provided that appellant would be allowed to temporarily store the second system at a designated site on Redstone Arsenal, but that "the

Government [was] under no obligation to purchase the remaining material, and it shall be removed from the facility by the end of the 180 day period at the contractor's expense." (R4, tab 26) It contained the following release and waiver: "The parties further agree that the changes to the contract listed above result in no change to the contract price. The contractor waives all right, title, and interest, if any, to further adjustment of these matters." (*Id*.)

Bilateral contract Modification No. P00004 was executed on 23 July 1997, to modify Modification No. P00003, by clarifying that the government was relieved "of any and all liability for contractor stored equipment and to limit final disposition of the stored equipment" to a source "approved by the US Government." Modification No. P00004 contained release and waiver provisions identical to those contained in Modification No. P00003. (R4, tab 28)

There is record evidence reflecting that, on 21 July 1997, Mr. Chastain went to the U.S. Embassy in Venezuela to obtain at least one visa for personnel to accompany the system to the delivery location. The visa was not granted until several days later. (Gov't opp. to app. third mot., ex. 1 at 15-21) Appellant claimed that it had been prepared to make delivery on 27 July 1997, but that the delivery had been delayed due to events associated with Mr. Chastain's visit to the U.S. Embassy. It requested a contract extension to 30 September 1997, and an additional advance payment. (R4, tab 32) There is conflicting evidence about the scheduled pick-up date, whether there were any DOT impediments to delivery, and some evidence that appellant still did not have a transportation contract for a commercial charter aircraft (R4, tab 29; gov't opp. to app. third mot., ex. 1 at 21-22, 31-32; app. reply, attach. 1 at 9-10).

By letter dated 4 August 1997, appellant requested an "immediate equitable adjustment . . . due to government-caused delay" in the amount of $203,200.00 as reflected in the accompanying invoice. In consideration for the adjustment, appellant offered to waive "the right to claim any future cost overruns on this contract." Additionally, it again requested a contract extension, this time until 30 September 1997. (R4, tab 33)

The contracting officer relied upon the invoice and responded by issuing bilateral Modification No. P00005 on 21 August 1997, pursuant to "FAR 43.103(A) [sic] and mutual agreement of the parties," extending the contract delivery date to 10 September 1997, and authorizing a second advance payment of $203,200.00. (R4, tab 34 at 1, 8; gov't mot. to amend answer, tab 2). The modification contained two waivers. The first stated: "In due consideration, the contractor agrees to waive its right to claim any increase in contract price as a result of delivery delays, if any, caused by the US Government in the past or future." The second release and waiver, like Modifications Nos. P00002 through P00004, stated that Modification No. P00005 "results in no change to the contract price," and like Modification Nos. P00003 and P00004, went on to provide that: "The contractor waives all right, title, and interest, if any, to further adjustment of these matters." (R4, tab 34)

On 29 August 1997, DOT issued Competent Authority Approval CA-9708019 for transport of the system by Amerijet from a specified airport not later than 30 September 1997 (gov't opp. to app. third mot., ex. 1 at 31-32). Appellant proposed to make delivery on 31 August/1 September 1997; however, at the last minute, the supplier decided he did not want to move the systems at that time and appellant requested that the proposed date be moved to 13/14 September 1997 (R4, tab 35). On 10 September 1997, CA-9708019 was extended to 31 December 1997 (gov't opp. to app. third mot., ex. 1 at 34). The record contains conflicting evidence as to whether appellant had actually secured commercial air transportation for either of these delivery dates (*id*., at 31-34; app. reply, attach. 1 at 3, 7-8, 19). In any event, the U.S. Embassy objected to the proposed 13 September date because it was too close to a planned visit by President Bill Clinton (R4, tab 35).

Thus, on 2 September 1997, bilateral contract Modification No. P00006 was executed pursuant to "FAR 43.103(a) AND MUTUAL AGREEMENT OF THE PARTIES," extending the delivery date to 31 October 1997. Like Modification No. P00005, Modification No. P00006 contained the following waiver: "In due consideration, the contractor agrees to waive its right to claim any increase in contract price as a result of delivery delays, if any, caused by the US Government in the past or future." Like Modification Nos. P00002 through P00005, it also stated: "This modification results in no change to the contract price," and like Modification Nos. P00003, P00004, and P00005, it further stated: "The contractor waives all right, title, and interest, if any, to further adjustment of these matters." (R4, tab 36)

Appellant then proposed to make delivery on 17/18 or 18/19 October 1997; however, it appears that, while transportation apparently had been arranged, the departure location was uncertain (gov't opp. to app. third mot., ex. 1 at 37, 39-41; app. reply, attach. 1 at 21). On 17 October 1997, appellant informed the contracting officer that the delivery of the systems planned for 19 October had to be postponed due to circumstances beyond the control of its supplier and that delivery might be possible on 25/26 October 1997 (R4, tab 37). The record contains conflicting information about the nature of the circumstances that caused the delay (gov't opp. to app. third mot., ex. 1 at 41-42; app. reply, attach. 1 at 21-22). On 23 October 1997, DOT issued Competent Authority Approval CA-9710017 to Kitty Hawk, Inc., authorizing transportation of the systems from a specified airport to Redstone Arsenal not later than 31 December 1997 (gov't opp. to app. third mot., ex. 1 at 43). Competent Authority Approval CA-9710017 was revised on 28 October 1997, to change the departure location to a specified island (*id*., at 45).

Bilateral contract Modification No. P00007, dated 29 October 1997, was issued pursuant to "FAR 43.103(a) AND MUTUAL AGREEMENT OF THE PARTIES." It extended the delivery date to 16 November 1997, and again recited that the "action result[ed] in no change to contract price." (R4, tab 38)

By letter dated 10 November 1997, appellant requested that the government make the final contract payment of $58,000.00. In making its request, appellant asserted that it had "encountered barriers to the performance of the contract" caused by disagreements between DIA and the U.S. Embassy in Venezuela. In particular, it asserted that "US [E]mbassy personnel have continually and actively opposed this project, . . . maligned Range Technology Corporation and its employees[,] . . . interfered with [Range's] planning and movement of equipment[,] and have actively tried to stop the project in myriad ways." Appellant claimed that these problems had driven up the cost of the project and requested an additional $80,000.00 to cover the cost of chartering an aircraft to ship the systems. (R4, tab 41)

Following discussions with appellant and other government officials, the contracting officer, on 24 November 1997, advised appellant that he would not make any additional contract payments, although he was willing to discuss increasing the CLIN 0003 not-to-exceed shipping cost by $9,000.00 (R4, tabs 42 to 46). The parties then executed bilateral Modification No. P00008, pursuant to "FAR 43.103(a) and Mutual Agreement of the Parties," which extended the delivery date to 31 December 1997, and again recited that "[t]his modification results in no change to contract price" (R4, tab 40).

Mr. Lacey executed bilateral contract Modification Nos. P00002 through P00008 on behalf of appellant (R4, tabs 15, 26, 28, 34, 36, 38, 40). A statement signed by Mr. Hanson (but, again unsworn) addressing the bilateral modifications was submitted as tab 4 to a status report requested by the Board of the pending criminal investigation. As to Modification Nos. P00003, and P00005 through P00008, Mr. Hanson makes virtually identical summary and conclusory assertions; namely, that the time extensions were due to the government's failure to approve proposed delivery dates and that the contracting officer never investigated appellant's complaints that these were government-caused delays and never made a formal decision as to who was responsible for the delays. He goes on to state that Mr. Larry Foster, the contracting officer's representative (COR), told Mr. Lacey that the contract would be terminated unless the modifications were signed and that the modifications were signed only because of "Mr. Foster's improper threats and duress" and the "mistaken understanding of the factual basis for the modification due to Mr. Foster's misinformation." Additionally, Mr. Hanson incorrectly states that he, and not Mr. Lacey, signed Modification No. P00003. (App. 15 June 2002 letter, tab 4 at 3)

The declaration of the contracting officer addressing the bilateral modifications was submitted as tab 2 to the government's motion for leave to amend its answer. In the declaration, the contracting officer avers that he did not threaten appellant in order to coerce it into executing any of these modifications and recalls only one discussion about termination, which occurred sometime in November 1997, when Mr. Hanson inquired about the government's options when a delivery date passed without a time extension. (Gov't mot. to amend answer, tab 2 at 1)

According to Mr. Hanson, appellant obtained quotes for air transportation for December 1997 delivery dates, but did not sign any subcontracts (app. reply to gov't opp. to app third mot., attach. 1 at 24). On 23 December 1997, the government learned that the supplier would not make delivery (R4, tab 48). That same day, it issued a cure notice which threatened termination for default under FAR 52.212-4(m) based upon appellant's failure to nominate delivery dates (R4, tab 47). Appellant responded on 29 December 1997, advising the government that contract performance had reached an impasse. It alleged interference by the U.S. Embassy in Venezuela, together with the lack of cooperation by the supplier and the lack of "problem-solving skills" on the part of Mr. Chastain, all three of which it asserted were "equally responsible for the situation." Finally, appellant offered suggestions on possible future courses of action. (R4, tab 49)

On 31 December 1997, the government issued a show cause letter which stated that the government was considering terminating the contract for default because appellant had not performed within the time provided and had failed to provide adequate assurances of future performance. The letter dismissed Range's allegations of interference by the U.S. Embassy as unsubstantiated, but provided appellant with another opportunity to provide further information regarding its failure to perform, and requested that appellant submit certified financial statements providing a full accounting of the government's advance payments with its response. (R4, tab 52)

By letters dated 8 and 9 January 1998, Range responded with further allegations of government interference in its continued attempts to arrange a delivery (R4, tabs 53, 54). The contracting officer disputed these allegations in a letter dated 15 January 1998, to which appellant responded on 19 January 1998 (R4, tabs 58, 59).

According to excerpts of his deposition transcript, the contracting officer did not believe there was any delay in performance because there was never an approved delivery date (app. reply to gov't cross-mot. to app.'s first mot. at 8-9). Mr. Hanson states that appellant was always "ready, willing and able" to deliver, but that the government never approved the proposed delivery dates (app. reply to gov't opp. to app. third mot., attach. 1 at 26). The contracting officer's declaration states that he understands the concept of excusable delay and that prior to December 1997, he agreed to extend performance because he believed appellant was making a good faith effort to perform the contract and that his extension of the delivery date was consideration for the modifications and appellant's continued efforts. It further states he does not recall any "detailed attempt to assess fault," and that he simply wanted the system delivered and gave appellant the money and time it wanted to perform. (Gov't mot. to amend answer, tab 2 at 2)

On 30 January 1998, the government terminated the contract for default. The termination letter stated that the government was entitled to return of advance payments of $533,140.00 (which is $60.00 less than the total amount advanced to appellant), but did not make a specific demand for payment. Additionally, the letter stated:

> I have determined that your failure to perform is not excusable, and that this notice of termination constitutes such decision. You have the right to appeal such decision under the Disputes clause of the contract (FAR 52.212-4).

(R4, tab 67)

According to the affidavit of Mr. Hanson, a copy of the termination letter was provided to appellant by fax, and in a telephone conversation that same day, he told the contracting officer he wanted to discuss the appeal process (R4, tab 69; app. opp. to mot. to dismiss, ex. 6 at 1-2). Mr. Hanson avers that he asked the contracting officer for an explanation of the appeal process because he "had no idea of what [his] appeal rights were at the time" (app. opp. to mot. to dismiss, ex. 6 at 1). The contracting officer's "CONVERSATION RECORD" and Mr. Hanson's affidavit agree that, during the telephone conversation, the contracting officer told Mr. Hanson that, if he wanted to dispute the termination decision, he needed to submit a certified claim, that a final decision would be issued in 60 days and he would then have the option to appeal. The "CONVERSATION RECORD" indicates that the contracting officer offered to provide a copy of the Disputes clause to Mr. Hanson; however, Mr. Hanson's affidavit states that he requested a copy of the FAR clause containing the appeal process. It is undisputed that he was provided with a copy of the October 1995 version of the Disputes clause, FAR 52.233-1. (R4, tab 69; app. opp. to gov't mot. to dismiss, ex. 6 at 2) Mr. Hanson further avers that he understood from the Disputes clause that appellant had six years to file a claim (app. opp. to gov't mot. to dismiss, ex. 6 at 2).

Finally, both Messrs. Hanson and Lacey aver that, if they had known they could appeal to the ASBCA and that they had only 90 days to do so, they would have filed an appeal within the time limit, but that they did not do so because the contracting officer did not tell them about the process (app. opp. to gov't mot. to dismiss, ex. 6 at 2, ex. 7 at 1).

On 15 June 1998, appellant filed for bankruptcy. In July 1998, Mr. Hanson was contacted by Mr. Duane Brummett, who was submitting a bankruptcy court claim for $140,000.00 to recover an advance payment he made to appellant on another contract and who inquired about appellant's assets. Mr. Hanson explained that appellant's only asset was a potential claim against the government on the contract at issue in this appeal. (*Id*., ex. 6 at 3-4) Thereafter, Mr. Brummett was appointed to act as counsel for appellant to pursue a claim against the government on behalf of the Trustee in Bankruptcy (R4, tab 74).

There is evidence that appellant instituted a complaint asserting bad faith and a breach of contract to the Department of Defense (DoD) IG in early 1998 (app. opp. to gov't mot. to dismiss, ex. 6 at 3; gov't reply, exs. 2 to 4). However, the record contains no contemporaneous evidence of any communication or activity regarding an appeal from the

contracting officer's 30 January 1998 termination decision until 12 August 1998, when Messrs. Hanson and Brummett discussed filing a challenge to the termination at the ASBCA and Mr. Brummett advised him that there was a 90-day time limit for filing such a challenge that had already passed, but that the 30 January 1998 termination letter failed to contain the proper notice of appeal rights so that the time limit should not have started and there was time to file an appeal from the termination and for a money claim (app. opp. to gov't mot. to dismiss, ex. 6 at 4-5).

On 30 September 1998, Range submitted a claim to the contracting officer, certified by Mr. Hanson, requesting that the termination for default be converted into one for the convenience of the government. The 30 September 1998 claim also requested that the contract be constructively changed to require delivery of two systems and that appellant be awarded an equitable adjustment of $1,270,549.00. The claim seeks $594,307.00 for direct and indirect costs through 25 April 1997; $433,693.00 for profit on two systems; $234,299.00 in delay costs from 26 April 1997 through 30 January 1998; and $8,250.00 for attorney fees. Following a deduction of $533,140.00 for government advances, the amount at issue is claimed to be $737,409. (R4, tab 75)

Nowhere in the claim does appellant assert that it failed to pursue a challenge to the default because of the procedural errors associated with the government's failure to provide notice of appeal rights in the termination decision and Mr. Hanson's conversation with the contracting officer on 30 January 1998 (R4, tab 75). In a final decision dated 18 December 1998, the contracting officer denied appellant's claim in its entirety and made a formal demand for payment of $533,140.00 (R4, tab 79).

An appeal was docketed on 4 January 1999. A stay of proceedings entered pending a criminal investigation was lifted on 19 April 2002. ASBCA No. 51943 has been assigned to the issues associated with appellant's challenge to the termination for default, ASBCA No. 54340 has been assigned to the issues associated with the contracting officer's denial of appellant's affirmative claim for $1,270,549.00, and ASBCA No. 54341 has been assigned to the government's claim for return of $533,140.00 in advance payments.

THE PENDING MOTIONS

The following motions and cross-motions are at issue.

1. The government's motion to dismiss for lack of jurisdiction, appellant's opposition thereto, and the replies of both parties;

2. Appellant's first motion for partial summary judgment regarding interpretation of the Equipment Delivery clause, the government's opposition and cross-motion for summary judgment asserting release and waiver based upon Modification Nos. P00002, P00003, and P00005 through P00008, including the affidavit of the contracting officer submitted as tab

2 to its motion for leave to amend the answer, and appellant's reply, including Mr. Hanson's unsworn statement submitted as tab 4 to appellant's 15 June 2002 letter;

3. Appellant's second motion for partial summary asserting that FAR Part 12 applies to the contract, the government's opposition and cross-motion asserting that FAR Part 49 is applicable, appellant's reply, and the government's response; and

4. Appellant's third motion for partial summary judgment seeking to have the termination for default converted into a termination for the convenience of the government, to which the government has filed an opposition and appellant's reply, including the signed, but not notarized, statement of Mr. Hanson, which were submitted as tabs 5 and 6 to appellant's 15 June 2002 letter.

THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

The government's motion to dismiss asserts that the Board lacks jurisdiction over appellant's challenge to the government's 30 January 1998 letter, terminating the contract for default and seeking the return of the unliquidated balance of its advance payments, because the appeal was not filed within 90 days and appellant has not demonstrated detrimental reliance and actual prejudice from the government's failure to advise appellant of its appeal rights and the potentially misleading conversation between the contracting officer and appellant's president on the day of the termination.

The government relies upon two recent Board decisions: *American Renovation & Construction Co.*, ASBCA No. 54039, 03-2 BCA ¶ 32,296, and *Medina Contracting Company*, ASBCA No. 53783, 02-2 BCA ¶ 31,979. In both cases, we dismissed appeals as untimely, notwithstanding the failure of the contracting officers to advise the contractors of their appeal rights in final decisions terminating the contracts for default. Both decisions are based upon *Decker & Company v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996).

Appellant's position is that our decisions in *Medina* and *American Renovation & Construction* do not apply because the contracting officer's 30 January 1998 decision terminating the contract for default did not provide the required notice of appeal rights and, as is established by the affidavits of Messrs. Hanson and Lacey, appellant was unaware of these rights and relied to its detriment upon the incorrect information provided by the contracting officer. The government's reply asserts that there is no contemporaneous evidence to support the claims of prejudice asserted in the affidavits; appellant's further view is that contemporaneous documentary evidence is not required to show detrimental reliance.

Discussion

The Contract Disputes Act (CDA) provides in 41 U.S.C. § 605(a) that a contracting officer's decision "shall inform the contractor of his rights as provided in this chapter." Sections 606 and 609, in turn, specify the required time limits for appealing to a board of contract appeals or the Court of Federal Claims.

In *Decker*, the contracting officer's decision terminating a construction contract for default advised the contractor that it could appeal to the Board within 90 days or to the Court of Federal Claims within one year. Because the Court of Federal Claims did not have jurisdiction over such terminations at the time, the notice of appeal rights was incorrect. Approximately five months later, the contractor filed a claim which included its final invoice and several other cost items, which the contracting officer denied, except as had been indicated in an earlier letter to the contractor. The contracting officer did not indicate that the denial was a final decision; the contractor filed an appeal from a deemed denial of its claim and also challenged the default termination. We found the challenge to the termination was not time-barred. *Decker*, 76 F.3d at 1577-78. The court of appeals disagreed. In *dicta*, it articulated the issue to be whether any defect in the notice was sufficient to deprive the notice of its legal effect and went on to state that it found nothing in the CDA to prevent us "from requiring contractors seeking to avoid an otherwise proper time bar on the basis of a defect in the notice of appeal rights to demonstrate detrimental reliance on that defect." It observed that the focus of the notice of appeal rights requirement contained in 41 U.S.C. § 605(a) was "the protection of the contractor" and that "[w]hen the contractor's determination regarding appeal is unaffected by the defect, the notice does not fail in its protective purpose." *Decker*, 76 F.3d at 1579-80. *See also State of Florida, Dept. of Insurance v. United States*, 81 F.3d 1093, 1098 (Fed. Cir. 1996) (default termination notice omitting any reference to the contractor's appeal rights was a harmless violation of 41 U.S.C. § 605(a) without detrimental reliance because the surety had actual notice of its appeal rights at the time it received the defective notice).

In *Medina*, the contract was terminated for default in a decision stating that the contractor had the right to appeal the termination under the Disputes clause (FAR 52.233-1 (DEC 1998)), but did not provide the specifics of the appeal rights. The contractor then wrote to the contracting officer seeking to have the default termination converted into one for convenience and indicating that it would appeal if the termination was not converted. The contracting officer declined to consider the request. An appeal was filed one year after the termination decision had been issued and the government moved to dismiss. When no further communications of any kind were received from appellant, despite the Board's efforts to reach its representative, the appeal was dismissed as untimely. 02-2 BCA ¶ 31,979 at 158,020-21.

In *American Renovation & Construction*, the contracting officer issued a "Partial Termination for Default" for uncompleted grading and landscaping in a military housing

contract at Malmstrom Air Force Base, Montana in a decision stating that the contractor had the right to appeal under the Disputes clause (FAR 52.233-1 (OCT 1995)), but did not provide the specifics of its appeal rights. Approximately 71 days later, the contracting officer terminated a second military housing contract at Malmstrom for default in a decision which correctly advised the same contractor of its appeal rights. Nearly a year after the partial termination, the contracting officer revoked the government's prior acceptance of work and terminated the first contract in its entirety in a final decision that again correctly advised the contractor of its appeal rights. Appeals from both termination decisions on the first contract were filed; the government moved to dismiss the appeal from the partial termination as untimely. We granted the motion, concluding that appellant had actual knowledge of its appeal rights because the termination of the second contract correctly advised it of these rights before the 90-day appeal period from the termination of the first contract had run and because it had not shown detrimental reliance or harm due to the defective decision. 03-2 BCA ¶ 32,296 at 159,804.

As the court observed in *Decker*, the notice of appeal rights required by 41 U.S.C. § 605(a) is for the protection of the contractor. The notice requirements are also set forth in subpart (a)(4)(v) of FAR 33.211, CONTRACTING OFFICER'S DECISION. Here, the termination decision did not provide the required notice. Rather, as in *Medina* and *American Renovation & Construction*, it simply stated that appellant had the right to appeal under the Disputes clause. However, instead of citing the Disputes clause, the termination decision cited FAR 52.212-4, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS, which in subparagraph (d), Disputes, refers to the FAR 52.233-1 Disputes clause. The difficulty caused by this defective and confusing notice was further compounded by the telephone conversation during which the contracting officer gave Mr. Hanson incorrect advice and the fax which provided Mr. Hanson with a copy of FAR 52.233-1, but not FAR 33.211.

Further, unlike *Medina*, appellant here has very aggressively pursued its appeal, and unlike *American Renovation & Construction*, there has been no other termination for default decision from which appellant might possibly have obtained knowledge about its CDA appeal rights before the 90-day time limit for filing an appeal at the Board expired. Most significantly, however, appellant has come forward with evidence consisting of the affidavits of its two principal officers averring that, if they had known they could appeal to the ASBCA and that they had only 90 days to do so, they would have filed an appeal within the time limits, but that they did not do so because the contracting officer did not tell them about the process. Inasmuch as the notice of appeal rights requirements are for the benefit of the contractor, we are not persuaded that appellant must also provide contemporaneous evidence to support its assertions of detrimental reliance under *Decker* as the government asserts.

Our decisions in *Medina* and *American Renovation & Construction* were based upon the unusual and exceptional factual circumstances associated with each appeal. They

are not applicable to the present appeal. We are satisfied that appellant has met the requirement of showing detrimental reliance discussed in *Decker*.

Having so concluded, we need not address appellant's additional contentions that the automatic extension provisions of the Bankruptcy Act, 11 U.S.C. § 108(a) somehow further extended the CDA's 90-day appeal provisions and that the appeal limitations were tolled when the contracting officer agreed to reconsider the termination decision and a timely appeal was filed after he issued the new final decision on 18 December 1998.

Decision

The government's motion to dismiss for lack of jurisdiction is denied.

THE MOTIONS FOR SUMMARY JUDGMENT

The standards we are to apply in deciding the summary judgment motions are familiar. Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

We must draw all inferences in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847 at 114,759. However, the opposing party must demonstrate that there is an evidentiary conflict on the record; mere denials are not sufficient. *Mingus*, 812 F.2d at 1390. Similarly, conclusory statements or completely insupportable, specious or conflicting explanations or excuses will not suffice to raise a genuine issue of material fact. *See Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993). Rather, the non-movant must set out specific evidence that could be offered at trial. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

I. Interpretation of the Equipment Delivery Clause and Bilateral Modification Releases and Waivers

A. Equipment Delivery Clause

Appellant's first motion for partial summary judgment seeks an interpretation of the contract's Equipment Delivery clause. Appellant argues that the clause gives the government the right to specify the exact time and date of delivery, within the window established by the clause. It asserts that delivery outside of this window constitutes compensable delay. According to appellant, the contracting officer interprets the Equipment Delivery clause to mean that the government is free to select a delivery date

outside of the delivery window, without incurring any liability for delay. The argument is apparently based upon excerpts from the contracting officer's deposition in which he stated he did not believe there was any delay in delivery because there was never an approved delivery date.

The government's opposition and cross-motion indicates that the government does not interpret the Equipment Delivery clause in the way that appellant asserts it does. On the contrary, the government agrees with appellant's interpretation of the clause, so long as the "not later than" delivery window is extended by the bilateral contract modifications executed by the parties.

We are satisfied that only matters of contract interpretation involving questions of law are at issue with respect to appellant's first motion for partial summary judgment. *See GTE Government Systems Corporation*, ASBCA No. 44080, 96-2 BCA ¶ 28,342 at 141,543. And, it appears to us that the parties are of one mind regarding the interpretation of the Equipment Delivery clause. The clause requires that, subject to the government's agreement, delivery must be scheduled within the specified window of time, as subsequently extended by the bilateral contract modifications. It is clear and unambiguous and we give it its plain meaning. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993).

To the extent that appellant reads the Equipment Delivery clause to mean that it is entitled to compensable delay simply because the system was not shipped between the original "no sooner than" and the "not later than" dates, we deny its motion. Such a reading not only assumes that all of the delay is attributable to the government, it also ignores the six bilateral contract modifications extending the "not later than" delivery date.

B. Bilateral Modifications

The government's cross-motion further asserts that appellant's allegations of delay are precluded by the bilateral delivery modifications to the contract. The government argues that appellant's consideration for these modifications was the waiver of its right to claim contract price increases for delays and that the government's consideration was the extension to the delivery dates and relinquishment of its right to terminate for default. It also contends that appellant waived any right to claim contract price adjustments. As the party asserting affirmative defenses, the burden of proof is on the government. *Jimenez, Inc.*, ASBCA No. 52825, 01-1 BCA ¶ 31,294 at 154,502.

Here, the parties executed six bilateral contract modifications establishing new delivery dates: Modification Nos. P00002, P00003, and P00005 through P00008. The last, Modification No. P00008, was executed 24 November 1997, and extended the delivery date to 31 December 1997. As we have stated many times before, in agreeing to these new delivery schedules, the parties eliminated from consideration the causes of delay

occurring before the mutually agreed extensions. *E.g.*, *Anchor/Darling Valve Company*, ASBCA No. 46109, 95-1 BCA ¶ 27,595 at 137,495, and cases cited.

Appellant opposes the government's cross-motion on grounds the bilateral contract modifications and the releases/waivers contained in them are void for lack of consideration, mutual mistake, and economic duress (app. reply at 20). It has provided a statement from Mr. Hanson which contains virtually identical summary and conclusory allegations for each modification blaming the government for all of the delays, except those associated with Modification No. P00002, and otherwise generally asserting mistake and duress.

In evaluating whether appellant has raised any genuine issues of material fact which preclude us from granting summary judgment to the government, we follow the guidance of *Maintenance Engineers*, ASBCA No. 23131, 81-2 BCA ¶ 15,168, which instructs that the "[r]elease or waiver of claims is basically a matter of intention." *Id*. at 75,073. Thus, we are to give the parties' contemporaneous actions great weight and refer to the surrounding circumstances to determine what they intended when they executed the six bilateral modifications at issue. *See Coastal Government Services, Inc.*, ASBCA No. 50283, 01-1 BCA ¶ 31,353 at 154,832; *accord CTA Incorporated*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 154,753.

As to the alleged lack of consideration, appellant assumes that the delays were caused by the government, and that some of the delays were also otherwise excusable (app. reply at 26). We note that this contention seemingly contradicts appellant's 29 December 1997 response to the cure notice in which it asserted that the lack of cooperation by its supplier and the lack of necessary skills on the part of its employee were also responsible for the impasse in contract performance. Nevertheless, appellant argues that, since the delays were caused by the government and the only consideration given to it were time extensions, it was denied valid consideration and the modifications are void. Its contention is based upon *Bootz Manufacturing Company, Inc.*, ASBCA No. 18787, 76-1 BCA ¶ 11,799 at 56,349, which it cites for the premise that "a modification which merely confirmed the contractor's pre-existing rights to a time extension was lacking in consideration" (app. opp. at 22). We think appellant's reliance upon *Bootz* is mistaken. Indeed, we have found no cases which follow *Bootz* for the proposition appellant asks us to apply.

In *Bootz*, we addressed the government's accord and satisfaction defense, not a release/waiver of claims defense. There, we examined the specific facts of record to determine whether there was a discharge of disputed claims by accord and satisfaction, and found none. We concluded that the modification at issue was the result of the contractor's consistent assertions of entitlement to time extensions for government-caused delays, which the government not only conceded, but had also confirmed entitlement to the number of days sought. No such factual circumstances are present here.

Further, in *Bootz*, there were no "manifestations between the parties during negotiations that further claims would be precluded, other than the gratuitous addition" of the statement that the change was made "at no change in contract price." 76-1 BCA at 56,342, 56,349. While all six of the modifications at issue in this case contain that same waiver, there is clear evidence from other language contained in the modifications and the attendant circumstances that the release/waiver language was not "gratuitous" and that the parties here intended to preclude potential claims.

The circumstances surrounding execution of Modification No. P00002 establish that it was issued at appellant's request, due to delays Mr. Hanson acknowledged it caused. Modification No. P00003 was issued following a meeting between appellant and the government at which the status of the operation was discussed. It memorializes the agreements reached during the meeting. Modification No. P00005 was issued in response to appellant's 4 August 1997 request for an equitable adjustment due to alleged government-caused delay and another request for an extension of the delivery date. The modification provided for both an extension of the delivery date and a second advance payment in the amount reflected on the invoice attached to appellant's request. Other evidence establishes that Competent Authority Approval was not issued by DOT until 29 August 1997, and that appellant had not secured commercial air transportation for the system(s) at the time Modification Nos. P00003 and P00005 were issued. Modification No. P00006 was issued when the supplier changed his mind about the delivery at the last minute and the government objected to the new delivery date proposed.

In Modification Nos. P00003, P00005 and P00006, appellant agreed to "waive[] all right, title, and interest, if any, to further adjustment of these matters." And, in Modification Nos. P00005 and P00006, it further agreed "to waive its right to claim any increase in contract price as a result of delivery delays, if any, caused by the US Government in the past or future."

Modification No. P00007 was issued after appellant advised the government that the planned delivery had to be postponed due to circumstances beyond the control of its supplier. There is evidence that appellant experienced problems, including uncertainty regarding the departure location, in scheduling a delivery. Modification No. P00008 was issued following discussion of appellant's claim of government-caused delay and its request for final contract payment and additional money to charter an aircraft for shipping. Modification Nos. P00005 through P00008, all recited that the modifications were issued pursuant to the mutual agreement of the parties.

Finally, although all six of the bilateral contract modifications were executed by Mr. Lacey, appellant relies upon the unsworn, conclusory statements of Mr. Hanson. In any event, irrespective of whether the delays were caused by the government as Mr. Hanson assumes, appellant has neither pointed to, nor presented, any specific evidence from which we could conclude there is a genuine issue of material fact regarding the intent of the

parties in executing Modification Nos. P00002, P00003, and P00005 through P00008. Nor can we infer from the record evidence that the consideration for any of these modifications was a "sham." *See EFG Associates, Inc.*, ASBCA No. 50342, 99-2 BCA ¶ 30,525 at 150,745.

On the basis of the foregoing, we conclude that *Bootz* does not apply. Rather, this case is more akin to *Rehabilitation Specialists*, ASBCA No. 26811, 83-2 BCA ¶ 16,553, where we found adequate consideration under circumstances reflecting that the contractor had not demanded a time extension for a specific number of days and the government had not conceded either responsibility for the delay or entitlement to the number of days claimed.

Appellant's next argument, mutual mistake, is again based upon the assumption that the delays are attributable to the government. As we understand the argument, appellant asserts that the contracting officer and the COR were mistaken in their understandings of whether the contract delays were excusable and, therefore, mistakenly assigned fault for the delays to appellant. Appellant goes on to assert that it mistakenly believed them and that, if both the government and appellant had known the true situation, neither would have executed the bilateral modifications containing the releases/waivers of delay claims. (App. reply at 22)

In order to successfully challenge the government's cross-motion for summary judgment on grounds of mutual mistake, appellant must come forward with evidence of disputed facts associated with the alleged mistaken beliefs on the part of both the contracting officer and appellant regarding a basic assumption which had a material effect upon performance for which appellant did not assume the risk. *E.g., National Presto Industries, Inc. v. United States*, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965). We are satisfied that appellant's mutual mistake contention is, at best, the unsupported and specious conclusory argument of counsel. *See Paragon Podiatry Laboratory*, 984 F.2d at 1190. Moreover, the argument appears to contradict the position it advanced based upon excerpts of the contracting officer's deposition in conjunction with interpretation of the Equipment Delivery clause.

First, there is no evidence whatsoever to support the notion that the contracting officer was mistaken about whether there was any excusable delay. On the contrary, the record establishes that the contracting officer never made a determination about which party was responsible for the delays and that he simply wanted to get the system delivered and believed appellant was making a good faith effort to do so. In this regard, Mr. Hanson agrees that the contracting officer never undertook any detailed attempt to assess fault during contract performance. Nor has appellant provided any legal authority (and we are aware of none) for its contention the contracting officer was required to assign fault before extending the delivery date.

Second, assuming that the government was responsible for the delays, it does not appear that there was any mistake on appellant's part about that fact inasmuch as Mr. Hanson asserts that appellant believed the delays were caused by the government and communicated its beliefs to the COR. To the extent that appellant may have mistakenly relied upon what it asserts was misinformation it obtained from the COR, the mistake was unilateral.

As to its last contention, duress, appellant asserts that the contracting officer threatened to terminate the contract for default if it did not sign the contract modifications and that when it refused to do so, the contracting officer did exactly what he had threatened to do (app. reply at 23).

In the context of the government's cross-motion for summary judgment, appellant must demonstrate the existence of a factual dispute involving at least one of the following elements of its duress assertion: (1) that it did not voluntarily sign the bilateral modifications extending the delivery date; (2) that the circumstances permitted no other reasonable alternative; and (3) that the government's behavior violated "notions of fair dealing." *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1388 (Fed. Cir. 1983). Improper behavior on the part of the government required to show duress has also been described as consisting of "coercive acts." *See Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003) ("[C]oercion requires a showing that the government's action was wrongful—*i.e*. that it was (1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing." *Id*. at 1330).

We again find no support for appellant's contention. In his declaration, the contracting officer denies having made any threats to appellant to coerce it into signing the modifications. Mr. Hanson's unsworn statement fails to raise a genuine issue of material fact on this issue for two reasons. First, since the threats to terminate the contract were allegedly made to Mr. Lacey, who executed the modifications, Mr. Hanson's statement is hearsay. Second, his statement is simply a general and conclusory allegation. *See Mingus*, 812 F.2d at 1390.

The two Court of Claims decisions relied upon by appellant, *Universal Sportswear, Inc. v. United States*, 180 F. Supp. 391 (Ct. Cl. 1959), and *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382 (Ct. Cl. 1969), *cert denied*, 398 U.S. 958 (1970), are readily distinguishable, principally because, in both cases, the government insisted upon contract modifications to which the contractors objected. The record contains no such evidence in these appeals. Additionally, in *Universal Sportswear*, there was uncontroverted evidence of duress and in *Urban Plumbing & Heating*, the court took pains to limit its holding to the particular facts and circumstances of the case.

In any event, government threats to terminate a contract for default do "not *ipso facto* violate 'notions of fair dealing.' It is only when the contracting officer uses wrongful conduct to obtain agreement that pressure becomes duress." *Double B Enterprises, Inc.*, ASBCA No. 52010, 01-1 BCA ¶ 31,396 at 155,112. Appellant has failed to set out any specific evidence of any such wrongful conduct on the part of the government in connection with the six modifications at issue here. *See Pure Gold*, 739 F.2d at 627.

For the reasons stated, we are satisfied that there are no genuine issues of material fact regarding the execution of the six bilateral contract modifications extending the delivery date and the releases/waivers contained in them. The modifications thus preclude consideration of appellant's contention that the government is responsible for the antecedent delays and its claim to recover delay costs incurred prior to 24 November 1997 is barred. *Environmental Devices, Inc.*, ASBCA Nos. 37430 *et al.*, 93-3 BCA ¶ 26,138.

Decision

Appellant's first motion for partial summary judgment and the Government's cross-motion are granted to the extent they assert the same interpretation of the contract's Equipment Delivery clause. Appellant's motion is otherwise denied. The Government's cross-motion asserting that appellant's allegations of delay prior to 24 November 1997 are barred by Modification Nos. P00002, P00003 and P00005 through P00008 is granted.

II. Application of FAR Part 12 or Part 49

Appellant's second motion for partial summary judgment asserts that the termination provisions of FAR Part 12 apply to this contract because it was awarded on SF 1449 and treated as a commercial item contract during performance. The Government's opposition and cross-motion asserts that FAR Part 49, including the fixed-price contract termination clauses contained in FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEPT 1996), and FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), should apply because the contracting officer mistakenly used the FAR Part 12 procedures and lacked authority to identify the system as a commercial item.

Definitions of commercial items are found in FAR 2.101 and 52.202-1(c)(1). FAR 12.301, SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS, provides at subparagraph (b) that the contracting officer insert the provisions found at FAR 52.212-4, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (MAY 1997), into the contract. It appears that the following FAR 52.212-4 subparagraphs are relevant to the issues in this case: (d) Disputes; (f) Excusable delays; (l) Termination for the Government's convenience; and (m) Termination for cause.

FAR 12.403, TERMINATION, explains that the FAR 52.212-4 (l) and (m) provisions "contain concepts which differ from those contained in the termination clauses prescribed in [FAR] Part 49" and that the requirements of FAR Part 49 are not applicable to termination of contracts for commercial items. According to appellant, a decision on whether Part 12 or Part 49 applies is necessary prior to a hearing for judicial efficiency (app. reply at 1). It does not, however, explain how its presentation of either entitlement or quantum evidence will differ. Nor does it explain how, if at all, any recovery to which it may be entitled would be impacted.

Nevertheless, appellant asserts that determination of whether a product or service is a commercial item is largely within the contracting agency's discretion, and that the determination should not be disturbed unless it is shown to be unreasonable, relying on *Premier Engineering & Manufacturing, Inc.*, B-283028, B-283028.2, 27 Sept. 1999, 99-2 CPD ¶ 65 at 5. The government responds that the Board should read out the contract provisions that the contracting officer had no authority to include and insert the termination provisions under *G. L. Christian and Associates v. United States*, 312 F.2d 418, *reh'g denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963).

Summary judgment is not appropriate where there are legitimate factual disputes, even in the case of cross-motions. *C & S Services, Inc.*, ASBCA No. 54032, 03-2 BCA ¶ 32,266. We are satisfied that the parties' contentions with respect to application of FAR Part 12 or Part 49 involve issues of fact relating to the reasonableness of the contracting officer's determination and the limits of his authority which we cannot decide on the present record. In any event, since the Board has not agreed to hear both entitlement and quantum in these appeals, appellant's motion appears to be premature because it will not be entitled to recovery of any of its claimed costs unless the termination for default is converted into one for the convenience of the government.

Decision

Appellant's second motion for partial summary judgment on the issue of whether FAR Part 12 applies and the Government's cross-motion for partial summary judgment asserting that FAR Part 49 should apply, are both denied.

III. The Termination For Default

Appellant's third motion for partial summary judgment asserts that the termination for default should be converted into a termination for convenience of the government. Attached to the motion are copies of the deposition transcripts of the contracting officer, the COR and the DIA government employee responsible for interface with appellant. Additionally, appellant relies upon a number of documents identified as "FOIA 98-[]," which we assume refer to documents obtained by appellant pursuant to a Freedom of Information Act (FOIA) request, but which have not been provided to the Board in support of its motion.

The government's opposition to the motion provides the declarations of six government witnesses, including the COR and the DIA employee responsible for interface with appellant. It contests virtually every fact appellant has proposed. Appellant's reply includes a lengthy, but, again unsworn, statement from Mr. Hanson.

Appellant's first argument is that the government was precluded from terminating the entire contract on 30 January 1998 because it accepted delivery of the system documentation on 17 March 1997. To support this argument, appellant relies upon *Building Contractors, Inc.*, ASBCA Nos. 14840, 15221, 71-1 BCA ¶ 8884 for the proposition that "acceptance of a product prevents termination for default of that product, absent a basis for revocation of acceptance of that product" (app. mot. at 19). We agree with the government that *Building Contractors* does not apply. In that case, the contractor had completed a contract to install new piping and the Government had taken beneficial occupancy of the work when the contracting officer terminated the contract. Unlike *Building Contractors*, appellant had not completed the contract by making full delivery when it was terminated. Moreover, the government's refund demand does not include $60.00, which it asserts represents the value of the system documentation and invalidates the underlying premise to appellant's argument (gov't opp. at 29). Irrespective of whether the government received any benefit from the system documentation, we find no basis in this record to conclude that the government could not terminate the contract for default. *See Banner Engineering Corporation*, ASBCA No. 29467, 85-1 BCA ¶ 17,831 at 89,246.

Appellant's next argument again assumes that the delays in delivery were caused by the government, or were otherwise also excusable, and that it is entitled to extensions to the delivery schedule such that it was not in default at the time the contract was terminated. In light of our conclusions above granting the government's cross-motion for summary judgment with respect to Modification Nos. P00002, P00003, and P00005 through P00008, we need consider only the delays occurring after 24 November 1997.

Appellant asserts that beginning on 31 October 1997, and continuing to the time of termination, its supplier was refusing to make delivery, and that under FAR Part 12, this is excusable delay (app. mot. at 21). The government points out that appellant's contention is dependent upon a conclusion that FAR Part 12 is applicable and disputes appellant's contention that a prime contractor is not responsible for the unexcused default of its subcontractor, citing *Wellington House v. GSA*, GSBCA No. 14665, 99-1 BCA ¶ 30,279. We agree with the government that our denial of summary judgment on whether FAR Part 12 applies precludes a conclusion regarding alleged excusable delay, beginning 24 November 1997. In any event, the proposed findings that appellant cites do not support its contention (app. mot. at 21). And, further, its contention that there was non-government caused excusable delay contradicts the delay chart it prepared in conjunction with its opposition to the government's cross-motion for summary judgment on the bilateral

contract modification releases and waivers (*see* app. opp. to gov't cross-mot. to app.'s first mot. at 26).

Appellant's next argument is that the contracting officer abused his discretion in terminating the contract because he was merely following direction from other government officials. The government's opposition characterizes these contentions as "pure speculation." We agree. Appellant's further and final contentions regarding the contracting officer's alleged abuse of discretion involve delay issues which we have previously rejected or found to be disputed, or otherwise constitute unsupported and conclusory arguments of counsel. *See Paragon Podiatry Laboratory*, 984 F.2d at 1190.

Decision

Range's third motion for partial summary judgment, seeking to convert the termination for default into one for convenience, is denied.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is denied.

Appellant's first motion for partial summary judgment and the government's cross-motion are granted to the extent they assert the same interpretation of the Equipment Delivery clause. Appellant's first motion is otherwise denied. The government's cross-motion asserting appellant's allegations of delay are barred by bilateral Modification Nos. P00002, P00003, and P00005 through P00008 is granted, thus precluding consideration of any delays which occurred prior to 24 November 1997.

Appellant's second motion for partial summary judgment regarding application of FAR Part 12 and the government's cross-motion regarding application of FAR Part 49 are both denied.

Appellant's third motion for partial summary judgment seeking to convert the termination for default into one for convenience is also denied.

Dated: 5 November 2003

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51943, 54340, 54341, Appeals of Range Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals